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**Office of
Government Ethics**

Office of Personnel Management
Washington, D.C. 20415

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M E M O R A N D U M

SUBJECT: Digest of Selected Letters of OGE - 1983

FROM: David H. Martin
Director

David H. Martin

TO: Designated Agency Ethics Officials and Other Interested Persons

Enclosed for your information is a copy of a digest of selected letters issued by the Office of Government Ethics during the calendar year 1983. This digest builds upon the one issued in January 1981 which covered the years 1979-1981 and the one issued in January for calendar year 1982. As you will note, the quick statutory index that is attached covers the total five year period.

Complete copies of these letters, with identifying information deleted, are maintained in OGE's library and are available to be reviewed there.* These are indexed by statute, regulation and subject. If you wish to obtain a copy of an individual letter opinion, please call the Office or stop by.

***Library Location:**

1717 H Street, NW
Room 436
Washington, DC

Mailing Address:

1900 E Street, NW
Room 436H
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Enclosure

DIGEST OF SELECTED OGE LETTERS

1983

OFFICE OF GOVERNMENT ETHICS

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79x6

1983

83 X 1
01/27/83

OGE advised a United States Attorney that based on a prior interpretation by the Department of Justice, the exception in 18 U.S.C. 205 for "testimony under oath" would permit a present employee of the U.S. Government to serve as an expert witness for the plaintiff even though the United States was a defendant-in-chief. OGE further advised, however, that it was this Office's position that the standards of conduct, primarily those set forth at 5 C.F.R. 735.201, would prohibit such testimony. On the other hand, if the United States were dismissed as defendant-in-chief and plaintiff agreed not to enter any evidence against the United States, the employee's service as an expert might not be incompatible with the interests of the United States and his employing agency could make a determination under the applicable standards of conduct to allow the employee's participation.

83 X 2
01/31/83

OGE advised a Government attorney that he might accept payment of his expenses for personal legal counsel from his former law firm when those expenses were incurred by him in a matter arising out of his prior private service as counsel to a corporation now the subject of a federal grand jury investigation. Payment was not prohibited by 18 U.S.C. 203 or 205 because the attorney was required to give sworn testimony to a Congressional committee and was, under the facts presented, representing himself. Further, acceptance and payment of the expenses was not prohibited by 18 U.S.C. 209 because such payments would be made under his former law firm's policy of paying such expenses to the extent they related to services former partners and associates performed while they were in the firm. Such a written policy fell within the exception of Section 209(b) for allowing continued participation in a bona fide employee benefit plan maintained by a former employer. In order not to violate the overarching standards of conduct of Executive Order 11222, the employee was required to recuse himself in any matter involving the law firm until a significant period of time had passed after its last payment to him or on his behalf in relation to the matter involving his prior legal services to the corporation.

83 X 3
02/04/83

OGE advised a DAEO that the acceptance by an employee of the reimbursement from a private source for travel expenses of a spouse accompanying the employee on official travel would probably, except under very limited circumstances, violate 18 U.S.C. 209 and the standards of conduct governing gifts. If the agency had gift acceptance

authority, it could, if it felt that the accompanying spouse was carrying out a function which fell within the agency's mission, accept the reimbursement on behalf of the spouse. This letter specifically highlighted that a reimbursement to a non-Government individual invited to attend and participate in a conference or meeting in his or her own right and not simply as the spouse of the Government employee would be permissible because it was not a payment or benefit to the employee accrued because of Government service.

83 X 4
03/25/83

Because of several inquiries from private citizens and the press, OGE issued a public statement concerning the applicable restrictions involved in the payments from a publisher to a senior White House official for a proposed diet book. OGE determined, after looking at the terms of the contract between the publisher and the official, that 1) a payment of an amount at the signing of the contract and another equal amount at the submission of the completed manuscript did not constitute an improper supplementation of Government salary prohibited by 18 U.S.C. 209 because the payments were for the creation of the book not for his Government services and that failure to create the book made the official liable for the money already paid; 2) these two payments of advances against royalties made in separate years did not violate the 15% outside earned income limitation which the White House by policy applied to its senior staff since Section 210 of the Act at that time did not apply and subsequent royalties earned on the sale of the book did not constitute earned income; and 3) the provisions of the Executive Order prohibiting certain senior presidential appointees including this official from receiving anything of value for writing a book dealing substantially with the activities of his agency would not apply as diet plans were not a normal part of White House functions. OGE did set forth other considerations under the Executive Order standards to which the official must be careful to adhere and stated that the White House Counsel, as the designated agency ethics official, must make certain determinations under the standards as the circumstances necessary to trigger a review arose. These future considerations generally revolved around potential use of Government position in the marketing and sale of the book.

83 X 5
03/29/83

OGE advised a DAEO that a former employee of his agency who, as a Government employee, had been involved in setting threshold limits on asbestos, would not be barred by 18 U.S.C. 207(a) or (b) from acting as an expert witness in litigation where the United States was a defendant and another defendant wished to use the former employee's testimony on the development of such limits. His work for the Government in setting these standards was not a particular matter involving a specific party or parties. Section 207(h) had no application in this question because the former employee's conduct was not otherwise prohibited by Sections 207(a), (b) or (c).

83 X 6
04/13/83

OGE advised an ethics counselor that 18 U.S.C 208 and 209 and the outside earned income limitations of Section 210 of the Act would apply in the following manner to the payments made under a Covenant Not to Compete entered into by a recent appointee prior to his Government service. The payments did not appear to raise a question under 18 U.S.C. 209 because, from the facts presented, they were made pursuant to an agreement entered into before contemplation of Government service and for a normal business purpose; the appointee would retain a financial interest in the corporation until the final payment under the agreement was made and would be required by 18 U.S.C. 208 to refrain from taking any action affecting the corporation; and, the payments would not violate the limitations of Section 210 as they were imposed by policy on him by the White House, because no services were required to be performed and because the payments did not fall within the two basic purposes of the outside earned income limitation (i.e. to prevent individuals from "cashing in" on their Government positions and to ensure that outside activities do not detract unduly from an individual's attention to his job).

83 X 7
04/25/83

OGE advised a former senior employee who, while serving the Government, had assisted his former agency in drafting proposed legislation, that he would not be prohibited by 18 U.S.C. 207(c) from representing a private client to the legislative branch on that legislation. He would be prohibited from representing a client on that legislation or any other matter to his agency or employees of his former agency for a period of one year following his departure. This included instances where the agency employees were also present at House or Senate meetings or hearings. OGE further advised that while proposed legislation was generally not a particular matter involving a specific party or parties, if the proposed legislation on which he had worked as an agency employee was akin to a private relief bill and thus involved specific parties, he should make a further analysis of the restrictions of 18 U.S.C. 207(a) and (b).

83 X 8
04/25/83

OGE advised a Government attorney of the general restrictions of 18 U.S.C. 207 should he decide to join a private law firm as an associate. The attorney had posed questions which could not be answered with any specificity because the terms of the statute "particular matter involving a specific party or parties" and "personal and substantial participation" require some factual detail in order to be applied. OGE did refer the attorney to ABA Opinion 342 and Armstrong v. McAlpin 461 F. Supp. 622 (S.D.N.Y.), aff'd, 625 F. 2d 433 (2d Cir. 1980); vacated, 449 U.S. 1106 (1981) for his use in determining what restrictions might apply to any firm he might join.

83 X 9
07/20/83

OGE advised a DAEO that since a statute creating a Government board required that individuals appointed as public members could not have any financial interest in a certain industry, an individual with shares in a company in that industry would have to divest herself of those shares if she were appointed as a public member. It was our opinion that she would still have a financial interest in the company within the meaning of the statute creating the board if she placed the stock in an irrevocable trust for the benefit of her children, two of whom were adults and two of whom were minors. At a minimum this arrangement would create an apparent conflict of interest.

83 X 10
07/21/83

OGE advised a DAEO that the Department of Justice has consistently held that there is no requisite intent to compensate an official for official duties and therefore no violation of 18 U.S.C. 209 in the bestowal upon a Government official of a bona fide award for public service or other meritorious service. Based on that precedent and our determination that the award was bona fide, we concluded that the award in question was not prohibited by 18 U.S.C. 209. Further, because the organization bestowing the award did not do business with or was not regulated by the agency employing the intended recipient, the award would not violate the standards of conduct relating to the acceptance of gifts.

83 X 11
07/26/83

OGE advised a DAEO that an employee of his agency would be prohibited by the agency's standards of conduct relating to the acceptance of gifts from receiving a cash public service award from an organization which was directly affected by action taken by the agency. Because the acceptance was prohibited, it was therefore unnecessary for the Office to make any determination of whether the award was a bona fide public service award for purposes of 18 U.S.C. 209.

83 X 12
08/03/83

OGE advised an agency that a former senior employee of the agency apparently violated 18 U.S.C. 207(c) by submitting an application to the agency on behalf of a corporation within one year from the time he left the agency. Further, because the matter on which he submitted the application was one in which he had apparently been personally and substantially involved as a Government employee and which at that time he participated involved specific parties, the former employee may also have violated 18 U.S.C. 207(a) by submitting the application. Finally, OGE pointed out that pursuant to 28 U.S.C. 535(b), the agency must refer the prima facie violation to the Department of Justice and that such a referral was also the initial step in any administrative action the agency might wish to consider under their regulations implementing 18 U.S.C. 207(j).

83 X 13
09/21/83

OGE advised a former Government attorney that he may have violated 18 U.S.C. 207(b)(i) by representing an individual in negotiations with a U.S. Attorney's office during a grand jury investigation when that investigation had been pending in the former employee's office during his last year of Government service and had been handled by an attorney who was, at the time, under the direct supervision of the now former Government attorney. OGE stated to the former Government attorney that because his letter to our Office on its face indicated this possible violation, we were required by 28 U.S.C. 535(b) to refer this to the Department of Justice for possible prosecution. (The attorney had written to our Office asking if Section 207 would prohibit him from simply assisting the individual without contacting the Government since his former office had first told him they saw no problem in his representing the individual and later, after he had done so, questioned his representations.)

83 X 14
09/26/83

OGE advised a department that a former senior employee subject to 18 U.S.C. 207(c) could not for a period of one year after leaving Government service represent a corporation to the department on any matter which was pending before the department or in which it had an interest. Further, because the former employee had been personally and substantially involved in developing a certain type of network for the department and at the same time the corporation had been identified as a party or one of a number of parties capable of establishing the network, the former employee was permanently prohibited by 18 U.S.C. 207(a) from representing the corporation before the Government in matters involving the establishment of this department's network.

83 X 15
10/19/83

OGE advised a Government employee who served as director of an office that this Office must decline his request for our approval of a trust he proposed to establish for the benefit of the employees in his office. In reviewing the proposed trust the only eligible recipients for grants from the trust would be defined by their federal employment. Payments to individuals from this private trust based on those strict eligibility requirements would give rise to an inference that such payments were made as outside compensation for Government services, an action which is prohibited by 18 U.S.C. 209(a). Further the Office determined that a case-by-case examination for Section 209 purposes of each grant or loan from the trust would not be feasible under the circumstances, nor would such a review be likely to yield a favorable result in most cases.

83 X 16
10/20/83

OGE advised a deputy DAEO that this Office agreed with past Department of Justice views that the President and Vice President are not legally subject to (1) the restrictions of the criminal conflict of interest laws in 18 U.S.C. 202-209 and (2) the standards of conduct set forth in Executive Order 11222 and the regulations thereunder, 5 C.F.R. Part 735 and 3 C.F.R. 10, but as a matter of policy, the President and the Vice President should conduct themselves as if they were so bound.

83 X 17
11/09/83

OGE advised a former non-senior employee who had, while an employee, been substantially involved in developing proposed legislation, that he was not prohibited by 18 U.S.C. 207(a) or (b)(i) from assisting a private organization in trying to achieve passage of the bill, as it was clear from a review of the legislation that it was not a particular matter involving specific parties. Further, nothing in the post employment restrictions of Section 207 prohibit a former executive branch employee from making a representation to Congress on any matter.

83 X 18
11/16/83

OGE advised the DAEO of a regulatory commission that a Commissioner is not absolutely prohibited from participating in adjudicatory proceedings in which one of the parties is represented by a law firm with which the Commissioner's adult son is engaged as an associate, but that each case should be examined to determine whether the Commissioner's participation would be appropriate under the circumstances. The recusal requirement of 18 U.S.C. 208 applies, with regard to children of Government employees, when the financial interest of a minor child is involved. The Office, for informational purposes, reviewed the due process requirements, the standards of conduct based on Executive Order 11222, and the standards applied to federal judges by 28 U.S.C. 455 and Canon 3 of the Judicial Code of Conduct, concluding that the Commissioner consider on a case-by-case basis whether his participation in any particular matter would create any of the adverse appearances prohibited by the standards conduct.

The Office further pointed out that our response would not be different when a tie would result without the Commissioner's participation. The "rule of necessity" operates to authorize, or perhaps to require, participation where recusal would otherwise be mandated and when failure to participate would leave no decision-maker or create a lack of a quorum. The potentially biased Commissioner's participation because of a tie at that late stage of a proceeding would appear far worse than participation in the matter from the beginning.

83 X 19
12/23/83

OGE advised an employee completing his federal employment on sick leave status that he remains an employee subject to the criminal conflict of interest laws of 18 U.S.C. 202-209 and the standards of conduct of Executive Order 11222 until he is formally placed on the disability retired role. The employee wished to accept a consulting contract with a corporation while on sick leave and wished to know what restrictions were applicable to him. The opinion pointed out that 18 U.S.C. 205 would prohibit him from representing the corporation on any particular matter to the Government and that 18 U.S.C. 203 would prohibit him from receiving compensation based on anyone else's representations to the Government. Further, his agency standards of conduct required that he get approval from his agency for this outside employment. (His agency was preparing advice to him on the post-employment restrictions applicable to him once his sick leave was used and he officially retired.)

83 X 20
12/30/83

OGE advised an agency that an employee of the agency would be prohibited by 18 U.S.C. 208 from taking action on a contract when his wife was employed by the contractor as a consultant on the contract (as distinguished from an employee of the contractor.) This prohibition attached because the wife clearly had a financial interest in the matter of the contract. Further, the Office stated that while the agency could waive the prohibition of the criminal statute under Section 208(b), this waiver would not, in our estimation, overcome the appearance of impropriety if the employee participated in the contract.